

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MICHAEL ZAPINSKI,

Defendant-Appellant.

UNPUBLISHED

May 13, 2003

No. 239028

Oakland Circuit Court

LC No. 00-001128

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to ninety months to forty years' imprisonment for each of the assault with intent to commit murder convictions, and two years' imprisonment for each of the felony-firearm convictions, with the former sentences running concurrently with each other but consecutive to the felony-firearm sentences. We affirm.

I. Facts and Procedural History

On March 26, 2001, at approximately 4:00 a.m., Paul Turner and Jack Hardesty went to defendant's house to lawfully repossess a vehicle. The vehicle belonged to defendant's wife. Turner notified defendant that he was there to repossess the vehicle. Defendant's wife notified defendant that her gun was in the vehicle. Defendant hid a loaded .45-caliber gun in his waistband and then went to the vehicle to retrieve his wife's gun.

Defendant retrieved his wife's gun from the vehicle, pulled out the .45-caliber gun from his waistband, and pointed both guns in the air. Turner and Hardesty began to run. Defendant warned Turner not to repossess the van and notified Turner that the guns were loaded. Turner and Hardesty got into their truck and heard shots as they drove away. A bullet hit the windshield and the right fender of the vehicle that the repossession men were towing. Defendant then hid the .45-caliber gun in the doghouse in the backyard.

The trial began in a courtroom that uses a videotape recording system. The first day of trial, the videotape malfunctioned and did not record the proceedings. The proceedings the first day of trial consisted of jury selection, preliminary instructions, opening statements, and the

testimony of the police dispatcher who was on duty the night of the incident in addition to the testimony of both Turner and Hardesty. Defendant filed a motion for a new trial or to settle the record. The trial court denied defendant's motion for a new trial, however the prosecution, defense counsel and the trial court settled the record.

II. Analysis

A. New Trial

Defendant's first issue on appeal is that the unavailability of the trial transcript denied defendant proper appellate procedure. We disagree. Whether the unavailability of a trial transcript denies a defendant his due process right to proper appellate review is a constitutional issue that is reviewed de novo on appeal. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

When a transcript is unavailable on appeal MCR 7.210(B)(2) governs. MCR 7.210(B)(2) provides, in pertinent part:

(2) *Transcript Unavailable.* When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall file a settled statement of facts to serve as a substitute for the transcript.

(c) The trial court or tribunal shall settle any controversy and certify a statement of facts as an accurate, fair, and complete statement of the proceedings before it.

Defendant claims on appeal that the certified settled record was not an adequate substitute for the full trial transcript and therefore, defendant was denied his constitutional rights of appellate review. If a defendant's right to appeal is impeded by the inability to obtain a transcript, a new trial is required. *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). However, a new trial is not automatic. A reviewing court determination is necessary regarding whether the surviving transcript is sufficient to allow evaluation of defendant's claims on appeal. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). Defendant carries the burden of demonstrating prejudice occurred as a result of the missing transcript. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986).

Defendant offers two errors that he claims so greatly prejudiced him that he was denied his constitutional rights of appellate review. First, defendant claims that the settled record and the surviving transcripts are insufficient to evaluate a claim of sufficiency of evidence because the only evidence relevant to an insufficiency analysis is the evidence missing in this case. This claim lacks merit. In accordance with the court rules, the settled statement of facts serves as a "substitute for the transcript," and represents an "accurate, fair, and complete statement of the proceedings . . ." MCR 7.210(B)(2) and (B)(2)(c) (emphasis added). Therefore, the evidence is not "missing" as suggested by defendant. The settled record may be used to determine sufficiency of the evidence. Second, defendant contends that the trial court's settled record and surviving transcripts are inadequate to evaluate a claim of whether the trial court abused its discretion in admitting weapons and ammunition into evidence. Specifically, defendant contends

that plaintiff, in its motion to admit the evidence at trial supported its position by stating that the defense theory as presented in his opening statement was that defendant was not familiar with weapons. Defense counsel claims however, that he did not say that defendant was not familiar with weapons in his opening statement, but rather stated that defendant shot the weapon because he “panicked.” Defendant alleges that an analysis of whether the trial court abused its discretion would involve looking at what defense counsel actually said in his opening statement. However, the settled record does not contain defendant’s opening statement. This argument also lacks merit.

Generally, all relevant evidence is admissible at trial. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to made the existence of a fact, which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentations of cumulative evidence. MRE 403; *People v Smith*, 243 Mich App 657, 670; 625 NW2d 46 (2000).

Viewing the statement in the light most favorable to defendant, even if defense’s theory was that defendant “panicked,” the admission of the weapons and ammunition is still relevant. The evidence was admissible regarding defendant’s familiarity with guns so that the jury could weigh whether defendant intentionally caused the gun to discharge, or whether the possibility existed that the gun discharged as a result of defendant’s “panic.” MRE 401; *Crawford, supra* at 388. The fact that defendant was familiar with various types of weapons and ammunition goes to defendant’s knowledge and understanding of firearms. Therefore, defendant’s opening statement was not necessary to determine whether the evidence was properly admitted during trial and defendant has failed to demonstrate an unconstitutional denial of a fair and effective appeal.

B. Sufficiency of the Evidence

The prosecution presented sufficient evidence to support defendant’s convictions for each count of assault with intent to commit murder. This Court reviews claims of sufficiency of the evidence by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203 (1999).

To establish the crime of assault with intent to commit murder the prosecution must prove the following elements: (1) an assault, (2) with the specific intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). “The intent to kill may be proved by inference from any facts in evidence.” *Id.*

Evidence established that Turner went to defendant’s home to repossess a vehicle and notified defendant why he was there. Defendant went to the vehicle and started “fumbling” with a lock box inside the vehicle. Defendant pulled out two guns and pointed them in the air. Hardesty testified that he began to run and notified Turner that defendant had a gun. Turner

testified that defendant stated, “they are loaded, I have a license” and directed Turner not to repossess the van. Turner also testified that he requested that defendant put away the guns, however, defendant replied that he was trained in using them and had a “license to kill.” Hardesty and Turner testified that they got into the truck and drove away. Defendant then ran into the street, and Turner and Hardesty both testified that they heard gunshots. Testimony indicated that the pathway of the bullet led straight toward the truck driven by Turner and Hardesty. Further, police testimony established that defendant admitted firing a gun at the van. Police testimony also established that defendant told the police in order to be safe he had to “shoot, shoot, shoot, kill, kill, kill.” Defendant did not stop shooting until he ran out of bullets. In front of the house, five .45 caliber gun casings were found and skid marks were observed from the truck in the area of the gun casings.

Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish the elements of assault with intent to murder. *McRunels, supra* at 181; *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Credibility of the witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Therefore, the evidence, when viewed in a light most favorable to the prosecution, was sufficient to convict defendant of assault with intent to murder.

III. Conclusion

In sum, the trial court properly denied defendant’s motion for a new trial because the settled record adequately protected defendant’s right to appeal, and defendant failed to demonstrate any prejudice that occurred as a result of the missing transcript. Additionally, the prosecution presented sufficient evidence to support defendant’s convictions for each count of assault with intent to commit murder.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra